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No. 95-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

State of Arkansas,

Petitioner,

v.

Farm Credit Services of Central Arkansas, PCA,
ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioner

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

In this age of reinventing government, it appears the use of government created or sponsored enterprises may be increased. *See* CREATING GOVERNMENT THAT WORKS BETTER & COSTS LESS—REPORT OF THE NATIONAL PERFORMANCE REVIEW, Chptr. 2, p.43, pp. 55-56 (Government Printing Office), 56-57 (General Services Administration), 57-58 (Center for Applied Financial Management of U.S. Department of the Treasury), 58 (National Oceanic and Atmospheric Administration), 60-61 (Federal Aviation Administration's air traffic control system), 64 (Conclusion) (GPO 1993). The purposes of this movement include the elimination of inefficient government sponsored monopolies that when transformed must compete with private business and the elimination of government red-tape that applies to public agencies. *Id.* at pp. 54-59, 60-62. Any increase in the use of government created or sponsored enterprises will create additional demands to know whether they are imbued with that aspect of sovereignty of the United States that entitles them to bypass state tax remedies and whether they enjoy a state tax exemption.

While Congress can be clear as to what its intent is about authorizing exceptions to the Tax Injunction Act, 28 U.S.C. §1341 (1994), and state tax exemptions, 49 U.S.C.A. §§24301(a)(3) and

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[1] This brief is filed pursuant to the consent of the parties.

24301(l) (Amtrak), 49 U.S.C.A. §11501(c) (railroad property), 49 U.S.C.A. §14502(c)(1) (motor carrier property), 12 U.S.C. §1452(e) and (f) (1994) (Federal Home Loan Mortgage Corporation), there are other times when Congress is not so clear. It is important to the States to have Congress be clear and specific about its intent to grant an exception to the Tax Injunction Act. Granting access to a federal district court on the basis of a single court's determination of alleged statutory ambiguity would undermine a cornerstone of "Our Federalism"—the minimizing of federal intrusion into sensitive state affairs without clear justification.

These issues concern the Multistate Tax Commission, because it was founded in response to increased interest in Congress in regulating state taxation, a reserved right of sovereignty of the States to operate effectively in their own sphere of influence. While Congress oftentimes has authority to regulate state taxation, its exercise of this authority may not be clear. When federal legislative proposals surface suggesting there may be some congressional interest in regulating state taxation, the Commission has sought to determine whether regulation of state taxation is, in fact, the intent of Congress. In addition to determining the actual legislative intent of the initiative that raises implications for state taxes, the Commission in these circumstances also seeks to inform Congress of the consequences of any intention to regulate state taxes.

This case falls within the concern of the Commission, as stated above, because Respondents' argument appears to be that Congress by

implication, and not by clear statement, has imbued production credit associations with that aspect of sovereignty of the United States that allows them to bypass state tax remedies. The Commission believes that adoption of Respondents' position would upset constitutional postulates and a fundamental declared policy of Congress that the Court has fully described in numerous cases. The Commission does not believe that in-roads should be made to "Our Federalism" on these thin circumstances. (Because the Commission views the Tax Injunction Act issue as quite important and dispositive of this case, the Commission is not directing its attention to the other issue in this matter—the determination of any congressionally established state tax exemption.)

Additionally, the Commission's interest in this case is to seek a robust reaffirmation of the strength of the Tax Injunction Act and its underlying policy. The Commission senses some possibility that not all federal courts share the Court's respect for the necessary dictates of our federal system.[2] The

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[2]This is not an unusual circumstance. The Tax Injunction Act itself was a legislative response to the failure of federal courts to respect the Court's admonitions in *Matthews* v. *Roger*, 284 U.S. 521 (1932). *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 128-129 (1981) (Brennan, J., concurring in judgment). The additional basis of the Commission's concern that is expressed in the text include the district court's summary treatment of this issue, below; *Northwest Airlines, Inc.* v. *Tennessee State Bd. of Equalization*, 11 F.3d 70 (6th Cir. 1993) (administrative fact finder's litigation position in another case that is opposite to taxpay-

Commission has a heightened interest in precluding the undercutting of the strong policy of the Tax Injunction Act, because States face any number of actions seeking to circumvent state tax remedies. Most recently, the Federal Communications Commission has noticed in the State of Oregon on the Petition of a third party that seeks to challenge that State's reference in its general property tax to the federal auction price paid by a personal communication service provider for its license. *Matter of Western PCS I Corporation*, Petition for Preemption and Motion for Declaratory Ruling, FCC File No. WTB/POL 96-3. This FCC action has occurred without regard to the policy of the Tax Injunction Act and to counterindicative statements of Congress. Section 601(c)(2) of the TELECOMMUNICATIONS ACT OF 1996, PUB. LAW 104-104 (1996), appearing as Historical and Statutory Note in 47 U.S.C.A. §152 (Supp. May 1996). In addition to preserving the strong policy of the Tax Injunction Act, a robust decision in this case will perhaps have the effect of preserving limited state resources that

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er's claim denies taxpayer a plain, speedy and efficient remedy); *Barringer* v. *Griffes*, 964 F.2d 1278 (2d Cir. 1992), *cert. denied*, 510 U.S. 1072 (1994) (notwithstanding *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338-39 (1990), court disregards representations of tax administrator as to availability of remedy and speculates on whether remedy is speculative); and *Direct Marketing Ass'n, Inc.* v. *Bennett*, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) (same).

are unfortunately expended defending state sovereignty from attacks that are more properly brought in state court.

In the end, the Commission's concern over bypassing state tax remedies is one of fairness. As has been observed previously with respect to the motivating factors for adoption of the Tax Injunction Act, Note, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?*, 45 WASH. & LEE L. REV. 381, 394 (1988), a separate system of justice for different classes of commerce inevitably creates disparities for similarly situated taxpayers, one segment of whom may have special access to remedies denied to others. Separate justice is not equal justice. The Commission seeks to avoid the adoption of a rule by the Court that will create the opportunity for this unfortunate aspect of federal district court intervention in state tax matters to occur with respect to financial instrumentalities that are competing in the same marketplace.

Your *amicus* finally notes that it is the administrative agency formed by the MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 751 (1994). Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems that followed the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1

and 23.[3] Twenty States have adopted the MULTISTATE TAX COMPACT through State legislation. Seventeen additional States have ratified the goals of the Commission by joining as associate member States.[4]

SUMMARY OF ARGUMENT

The decisions of the Court and other federal courts firmly establish that the Tax Injunction Act is a bar to subject matter jurisdiction of the federal district courts in a state tax challenge brought by a complainant within the terms of the proscription. A State may not waive this jurisdictional bar.

The Court has never before addressed whether a "federal instrumentality" may *unilaterally* bring a state tax challenge in federal district court. The proper rule for determining whether an enterprise chartered under federal law and nominally

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[3] The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

[4] The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Arizona, Connecticut, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

designated a federal instrumentality is free to avoid the restrictions of the Tax Injunction Act is whether the United States has joined in the state tax challenge or Congress has clearly stated that this instrumentality is not bound by the Act. Since the United States has affirmatively disavowed the position of Respondents, the only basis for the jurisdiction of the federal district courts in this case is a clear statement from Congress. Congress has not clearly stated that production credit associations should have access to federal district courts in state tax challenges.

The proposed clear statement rule properly delegates to Congress the obligation of determining whether it seeks to imbue the entities it authorizes to further federal policy with an important aspect of sovereignty of the United States. Providing federal court access to production credit associations would potentially irritate Federal/State relations. The political process of Congress is the proper arena to determine the friction points of "Our Federalism."

Moreover, production credit associations still maintain an adequate remedy for federal claims, because state courts are bound to enforce federal law and the Court is in a position to review any state court decision. On the other hand, if, for any reason, a state lacks an adequate remedy, the restriction of the Tax Injunction Act does not apply. In important cases, the United States can always join in the claim brought by the instrumentality to ensure a federal forum. The proposed rule also conforms to the Court's understanding that federally chartered corporations may not avoid the

restriction of the Eleventh Amendment by reason of their status.

The Complaint of Respondents must be dismissed for lack of jurisdiction of the federal district court to entertain the state tax challenge in this matter.

ARGUMENT

I. THE TAX INJUNCTION ACT ESTABLISHES A RULE OF SUBJECT MATTER JURISDICTION AND THE COURT MAY CONSIDER ITS APPLICATION REGARDLESS OF THE ARGUMENTS OF THE PARTIES.

Respondents' Brief in Response to the Brief for the United States as *Amicus Curiae* does not advance any argument disputing the United State's proposition that the Tax Injunction Act, 28 U.S.C. §1341 (1994), establishes a rule of subject matter jurisdiction. The mandatory language of the Tax Injunction Act and this Court's earlier statements certainly suggest this understanding. *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338-39 (1990) (limits jurisdiction); *California* v. *Grace Brethren Church*, 457 U.S. 393, 417, n.38 (1982) (limits jurisdiction/jurisdictional bar); *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, n.19 & 522 (1981) (transfer and limit of jurisdiction). Several federal courts have affirmatively held that the Tax Injunction Act establishes a subject matter jurisdictional bar, *e.g.*, *International Lotto Fund* v. *Virginia State Lottery Dept.*, 20 F.3rd 589 (4th Cir. 1996), and is non-waivable. *E.g.*, *Keleher* v. *New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2nd Cir. 1991). These

interpretations are consistent, as noted by the United States in its *amicus* brief on the petition at n.2, with the Court's dismissal in *Grace Brethren Church* notwithstanding California's attempted invocation of the jurisdiction of the federal district court.

II. THE TAX INJUNCTION ACT BARS RESPONDENTS' COMPLAINT IN THIS CASE, BECAUSE AN "INSTRUMENTALITY OF THE UNITED STATES" MAY NOT CHALLENGE STATE TAXES IN FEDERAL DISTRICT COURT UNLESS THE UNITED STATES HAS JOINED OR CONGRESS HAS CLEARLY STATED THAT INTENTION.

We understand the issues of this case to involve whether there is an implied right of access to federal district court (jurisdiction) and an implied state tax exemption (substance). The resolution of both issues flows from Respondents' status as "federal instrumentalities" that may indicate some level of implied sovereignty that is derivative of the United States.

The determination of each issue is apparently separate. *See Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 471 (1976). Yet, a finding of *implied* jurisdiction based on the entity's federal instrumentality status would not further much of a federal interest, if there is no *implied* exemption from state tax. It would be a strange result to have on the issue of jurisdiction a tolerant standard for imbuing a federal instrumentality with aspects of the sovereignty of the United States and to have on the issue of substance a more narrowly construed standard that

preserves "Our Federalism." These considerations lead us to believe it is relevant in resolving the jurisdictional issue to know what standard the Court applies to the substantive issue of when federal instrumentalities enjoy an implied exemption from state taxes.

Initially, we note that there are no decisions of this Court suggesting that a federal instrumentality may unilaterally bring an action challenging state taxes in federal district court. The holding of *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966), is limited to concluding that the Tax Injunction Act "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions."

In the absence of applicable precedent, the Court should adopt the rule that an instrumentality of the United States may not bring an independent, unilateral challenge to state taxes in federal district court, unless (i) the United States has joined the action to support the jurisdiction of the federal district court (a condition that cannot be met here); or (ii) Congress has clearly sanctioned the jurisdiction of the federal district court. The Court's adoption of this rule would be consistent with the constitutional postulates that animate the Tax Injunction Act itself and additional constitutional considerations. The rule proposed rejects the apparent approach of the federal district court in this matter: A federally chartered entity statutorily designated a federal instrumentality is, like the United States, not bound by the Tax Injunction Act.

There are several reasons for concluding that the proposed rule should be adopted.

The Court's recognition that the United States could bring a suit in federal court against a State without the State's consent followed as an inherent consequence of the constitutional plan. *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934). The United States is the embodiment of the national union whose very existence might well be threatened were the United States otherwise prohibited from taking this kind of action. Upon this observation and with the additional assistance of legislative purpose, the Court made two observations in *Department of Employment*: (i) the plain language of the Tax Injunction Act did not apply to the United States acting on behalf of itself and on behalf of its instrumentalities; and (ii) the United States, consistent with the Constitution, could bring its suit in federal court without the consent of the State. *Department of Employment*, 385 U.S. at 358. If the ability of the United States itself to call the tax system of a State to task in federal court is dependent upon these imposing considerations, we submit like considerations *and more* must apply to the designated instrumentality of the United States.

A federally chartered entity that is a federal instrumentality is not by that status the United States itself. *See Federal Reserve Bank of Boston* v. *Commissioner of Corporations and Taxation*, 499 F.2d 60, 62-63 (1st Cir. 1974) (An acknowledged federal instrumentality playing slight governmental role must secure participation of the United States

to support federal district court jurisdiction in state tax challenge.); *cf. United States* v. *New Mexico*, 455 U.S. 720, 735-37 (1982) (A state tax exemption is based upon the inseparability of the United States and the agency's or instrumentality's activities or upon the taxpayer standing in the shoes of the Federal Government. A federal instrumentality is "virtually an arm of the Government," "integral parts of [a governmental department]," or "arms of the Government deemed by it essential for the performance of governmental functions." Quoting other cases.)

If a federally chartered instrumentality necessarily is an entity different from the United States, it is reasonable to require as a condition precedent to the bringing of a state tax challenge in federal district court the establishment of one of two things: (i) a clear statement of Congress that it intends to extend the sovereign right of the United States to bypass state tax remedies; or (ii) the joinder of the United States itself. In either case, the United States by its official action has assented to federal court involvement into one of the most sensitive aspects of the federal union, the internal fiscal affairs of individual States.[5] *E.g.*, *Fair Assessment in Real*

[5] Of course, there may be some limit on the ability of the United States to grant access to federal district court in all cases. *See Smith* v. *Reeves*, 178 U.S. 436, 446 (1900) (federally chartered entity is not by that status free to ignore Eleventh Amendment) and *Seminole Tribe of Florida* v. *Florida*, ___ U.S. ___, ___, 116 S.Ct. 1114, 1131-32 (1996) (the power of Congress under the Commerce Clause is subject to Eleventh Amendment).

Estate Association v. *McNary*, 454 U.S. 100, 102-103, 108-109 (1981). In the absence of these indicia, there is no basis for determining that the United States itself will be harmed by denying a federal instrumentality access to federal district court for its state tax challenge. (Because there is no possibility of the United States joining Respondents in this case, the remaining argument will focus primarily on the need for a clear statement from Congress to support the jurisdiction of the federal district court in this case.)

Some may claim that it is inappropriate to impose the clear statement rule with respect to federal instrumentalities, because this places legitimate governmental activities at an additional risk that does not apply to the Federal Government. The traditional rule that applies to the ability of the Federal Government to sue the States, including the bringing of a suit in federal district court, is that no restraint will be recognized except in the presence of a clear statement of that intent by Congress. *E.g.*, *United States* v. *Broward County, Florida*, 901 F.2d 1005, 1008 (11th Cir. 1990), applying *Hancock* v. *Train*, 426 U.S. 167, 179 (1976). To restrict some federal instrumentalities from access to federal district court, the argument might continue, is to suggest these instrumentalities are somehow not in furtherance of the governmental interests of the

The interaction of these cases seems to suggest there is constitutional content to determining what kinds of entities authorized or created by Congress are synonymous with the United States for purposes of bypassing state tax remedies.

United States, a proposition inconsistent with *Federal Land Bank of Wichita* v. *Board of County Commissioners*, 368 U.S. 146, 150-151, n.15 (1961).

There are many reasons why this simplistic approach of automatically granting federal instrumentalities the same sovereign rights of the United States should not apply to state tax challenges, a matter affecting a fundamental aspect of the States' reserved sovereignty. *See Dows* v. *Chicago*, 78 U.S. (11 Wall) 108, 110 (1871). The requirement of a clear statement from Congress is still the appropriate rule.

First, recognition of the clear statement rule in this context is a logical extension of the same requirement that the Court places on congressional enactments that seek to override the Eleventh Amendment. *Seminole Tribe of Florida* v. *Florida*, ___ U.S. ___, ___, 116 S.Ct. 1114, 1131-32 (1996). Unless the Court is prepared to embrace the rule that all federal instrumentalities by virtue of that status alone may bypass state remedies in challenges of state taxes, the clear statement rule merely ensures that Congress in employing an instrumentality to further some federal policy actually intends to affect sensitive Federal-State relations. As noted previously, the current consideration given to reengineering government, p. 1, *supra*, creates a need to inform Congress that authorizing the bypass of the Tax Injunction Act requires a clear statement of that intent.

Second, placing the non-onerous requirement of the clear statement rule on Congress recognizes the

paramount responsibility of Congress to determine the friction points of our federal system in its political process. *Cf. United States* v. *New Mexico*, *supra*, 455 U.S. at 737-38, (Absent congressional direction, state tax power can be denied only under clearest constitutional mandate.). With no substantial benefit flowing to the Federal Government from a rule granting automatic federal district court access for state tax challenges of all federal instrumentalities, it is unreasonable to suggest the preservation of the national union is implicated in the clear statement rule. Unless Congress has authoritatively spoken, therefore, the Court should not embrace a rule that will incur the substantial detriment of exposing state fiscal affairs to the intrusion of a single federal judge's examination. *See Perez* v. *Ledesma*, 401 U.S. 82, 93, 108-110 (1971) (Brennan, J., concurring in part and dissenting in part) (Three-Judge Court Act with its direct appeal provision responded to concerns over single federal judge reviewing the constitutionality of State law.).

Third, the absence of jurisdiction in the federal district courts is not a denial of a legal or equitable remedy to the instrumentality's federal claim. State remedies exist to respond to the claims. Federal law remains supreme in the state adjudication of federal matters arising under state law. *See Testa* v. *Katt*, 330 U.S. 386, 390-91 (1947). There is no assumption that federal courts are any more competent or efficient preservers of federal concerns. *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 431 (1982); *Stone* v.

Powell, 428 U.S. 465, 494 n.35 (1976). In any event, the Court may review any state court decision that may be rendered.

Fourth, a failsafe procedure is available to ensure that *any* legitimate federal instrumentality can always gain access to federal district court, if its state tax challenge truly raises issues affecting the governmental interests of the United States. There should be little opportunity to object to a state tax challenge brought in federal district court by the federal instrumentality *if the United States joins*.

Fifth, in the truly extraordinary case, an unprotected federal instrumentality may still gain access to federal court, if the state remedy is not "plain, speedy and efficient." 28 U.S.C. §1341 (1994). This access to federal district court in state tax matters invokes the doctrine of Ex Parte *Young*, 209 U.S. 123 (1908).

Sixth, the adoption of the rule that Congress must clearly speak to provide access to federal district court in state tax challenges brought by a federal instrumentality conforms to the Court's earlier recognition that a corporation chartered pursuant to federal law is not entitled by that status to circumvent the restrictions of the Eleventh Amendment. *Smith* v. *Reeves*, 178 U.S. 436, 440 (1900). This ruling in practical effect indicates that the mere congressional blessing of the activities undertaken by an entity pursuant to its federal charter does not support a conclusion that the entity and the United States are so closely entwined to make them inseparable. There must be substance to the determination that a federal instrumentality

is imbued with the sovereignty of the United States. A clear statement by Congress of its intent in establishing or authorizing the formation of an instrumentality adds the missing substance.

These considerations justify and support the policy that it is better for the affected sovereign (the State) whose laws are being challenged to be given the first opportunity to evaluate and lend its expertise with the affected local law to the resolution of the dispute. *Cf. National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

If the appropriate standard is that Congress must speak clearly, then attention must be given to whether Congress has so spoken in this case. We believe the current statutory circumstances of production credit associations are little more than a declaration that these associations may be chartered under federal law. The legislation surrounding production credit associations does not suggest a condition of inseparability.

Although the federal statutes clearly label production credit associations as federal instrumentalities, the designation is limited in effect. The declaration in 12 U.S.C. §2071(a) (1994) is that each production credit association continues "as a Federally chartered instrumentality of the United States." The clear implication of §2071(a) is that instrumentality status given is dependent upon its Federal charter—something akin to the status of national banks that the Court has called indisputable "tax-immune instrumentalities of the United States." *Department of Employment*, *supra*,

385 U.S. at 358. But no one is so bold to suggest that a national bank's instrumentality status would render the Tax Injunction Act inapplicable. *Federal Reserve Bank of Boston*, *supra*, 499 F.2d at 62-63 (1st Cir. 1974); *Dominion National Bank* v. *Olsen*, 771 F.2d 108, 112 (6th Cir. 1985) (existence of plain, speedy and efficient remedy would preclude federal court action brought by national banks).

The other declaration of federal instrumentality status, 12 U.S.C. §2077 (1994), is similarly restricted. Section 2077 declares each production credit association and its obligations "instrumentalities of the United States." This declaration is limited in effect by thereafter noting that "as such" the notes, debentures, and other obligations issued by the associations shall enjoy a tax exemption that is expressly defined. The statute recites no other benefit flowing from the declared status of a federal instrumentality. Section 2077's use of language that explains the consequences of instrumentality status is consistent with the Court's advice in *United States* v. *New Mexico*, *supra*, published approximately three years before the 1985 technical amendments to §2077.

Congress stated in both of the cited sections what it meant by stating that a production credit association is a federal instrumentality. It would violate the Court's concern for preserving the sovereignty of the States as constituent members of our federal system to take these declarations as clear evidence that Congress intended production credit associations to have direct access to the federal district courts in state tax challenges.

We do not believe the conclusion that there is no clear statement from Congress of its intent to allow production credit associations access to federal court is inconsistent with either the Court's determination in *Moe*, *supra*, or *Federal Reserve Bank of Boston*, *supra*. We read both of those cases to be a circumstance where the deciding court rested heavily upon the determination that Congress had spoken to establish access to federal district court.

Parenthetically, we note also that there is no support for contending that Congress has generally announced an intent that a declared federal instrumentality, *qua* instrumentality, is automatically entitled to assume the shoes of the United States for purposes of avoiding the Tax Injunction Act. Congress appears to be quite sensitive to declaring when it wants federal access for entities established by congressional action or third parties. *See* federal statutes cited at pp. 1-2, *supra*. Denying federal district court access when Congress has not clearly stated that intention avoids allowing instrumentalities not "integral parts of [a governmental department]," or "arms of the Government deemed by it essential for the performance of governmental functions," *United States* v. *New Mexico*, *supra*, 455 U.S. at 737, quoting *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942), to benefit from the sovereignty of the United States under pretense.

While the rule of presuming the United States is free of the restrictions of the Tax Injunction Act without a clear congressional statement to the contrary befits the actual sovereign, the application of

the rule in these circumstances is without justification. We note in this regard the searching analysis that the Court applied in determining whether the sovereign immunity of the States was transferred to a port authority, an entity created by the action of two States and the United States. *Hess* v. *Port Authority Trans-Hudson Corporation*, ___ U.S. ___, 115 S.Ct. 394 (1994). While not directly applicable to these circumstances, this case illustrates the sensitivity the Court exhibits before recognizing instrumentalities are imbued with the sovereignty of their governmental creators. The only appropriate rule is to require that either Congress clearly state its intention to imbue its instrumentalities with its sovereign status or alternatively the joinder of the United States. In neither case is the sovereign interest of the United States significantly impaired.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court entertain the issue of whether the Respondents may unilaterally bring a state tax challenge in federal district court, that the Court adopt a rule that a "federal instrumentality" may not, consistent with the Tax Injunction Act, unilaterally bring a state tax challenge in federal district court without a clear statement from Congress that it intends its instrumentality so to be imbued with the sovereignty of the United States, and that the

Court remand this matter with instructions to dismiss the Complaint of Respondents for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED,

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